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580094—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 797

THE STARR PIANO COMPANY, PACIFIC DIVISION, A CORPORATION, PETITIONER

v.

ETHEL STRICKLAND ROGAN, EXECUTRIX OF THE LAST WILL OF NAT ROGAN, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 41–42) is unreported. The opinion of the Circuit Court of Appeals (R. 59–67) is reported in 139 F. 2d 671.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 27, 1943. (R. 68.) The petition for writ of certiorari was filed on March 16, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether taxpayer in 1934 realized taxable gain through the liquidation of its wholly owned subsidiary, the assets of which it received under a merger agreement executed pursuant to Section 361, Civil Code of California.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 7–9.

STATEMENT

The District Court adopted the written stipulation of facts (R. 43) which insofar as here relevant may be summarized as follows:

In 1921 taxpayer as lessee entered into two ninety-nine-year leases covering properties in Los Angeles, California (R. 20). In May 1922 taxpayer caused to be incorporated under the laws of California the Gennett Realty Company (hereinafter called Gennett) for the purpose of holding legal title to the leases. Taxpayer thereupon transferred to Gennett all its right, title, and interest in the leases in exchange for Gennett's entire capital stock. At all times during Gennett's existence, taxpayer owned all of Gennett's stock. (R. 20–21.)

During July and August 1934, Gennett merged into taxpayer under an agreement entered into pursuant to the laws of California (R. 23–24). The agreement provided that taxpayer should be

and become the surviving corporation and that (R. 29)—

> All of the assets of Gennett Realty Company of every kind or nature, both real and personal, wheresoever situated, shall *ipso facto,* by virtue of this merger agreement, be and become vested in The Starr Piano Company (Richmond, Indiana), Pacific Division.

Taxpayer assumed and agreed to pay all of Gennett's debts, liabilities, and obligations (R. 31). All outstanding shares of Gennett's stock were to be cancelled *ipso facto* by virtue of the agreement and the holders were to surrender the same to the secretary of taxpayer for cancellation. The outstanding shares of taxpayer's stock were unaffected by the agreement. (R. 31.) The assets of Gennett were merged into and acquired by the taxpayer, and Gennett's debts assumed as of August 1, 1934 (R. 31).

The taxpayer sued the Collector of Internal Revenue to recover $73,557.08, plus interest, as income and excess-profits taxes paid for 1934 (R. 2–9). It was stipulated that the assessments were occasioned solely by the Commissioner's determination that gain or loss was recognizable for tax purposes, upon receipt by taxpayer of the property through the merger. If gain or loss was properly recognizable, taxpayer was not entitled to recover. If it was not recognizable,

taxpayer was entitled to recover. (R. 26.) There was no controversy over either the basis of the stock, the value of the assets received, or the computation of the amount of the gain.

The District Court held no gain or loss resulted through the merger, and that it was a nontaxable exchange under the provisions of Section 112 (b) (4) of the Revenue Act of 1934 (R. 41–42). Upon appeal the Circuit Court of Appeals reversed (R. 58–67).[1]

ARGUMENT

The case was correctly decided and there is no conflict.

Gutbro Holding Co. v. *Commissioner,* 138 F. 2d 16 (C. C. A. 2d), which is asserted to be in conflict, did not present the same question. In that case the taxpayer was organized to take over the assets of two existing corporations. Since the court held that the transferee was a new corporation, the transaction could not be a liquidation because the transferee was not a stockholder of the transferring corporation. Here it is agreed that taxpayer was the sole stockholder of the Gennett Realty Company (R. 21), and it is thus apparent that its relationship to the transaction is quite different from the relationship of *Gutbro* to the transaction involved in that case. It fol-

[1] Pending the appeal the Collector of Internal Revenue died and his executrix was substituted as a party.

lows, of course, that the *Gutbro* decision dealing with a nonstockholder is not in point when considering the position of the stockholder in the case at bar.

The court below correctly held that Section 112 (b) (3) is not applicable because there was no exchange of stock or securities in the Gennett Realty Company for stock or securities in the taxpayer. While the *Gutbro* opinion (p. 20) held that the statute was satisfied by charging the new corporation with the same stock liability that it would have had if new certificates had been issued, that decision cannot be applicable where, as here, there is no new corporation. Since the taxpayer already owned the Gennett stock, it would have been impossible for it to have issued its own stock in exchange therefor. Accordingly, unlike the *Gutbro* case (p. 20), the failure to issue the stock here is not a mere omission of "the useless handling of the pieces of paper * * *."

The question presented is not of present importance, since the Revenue Act of 1936 introduced a new policy of making distributions to parent corporations nontaxable. See Section 112 (b) (6), Revenue Act of 1936, c. 690, 49 Stat. 1648. *Helvering* v. *Credit Alliance Co.*, 316 U. S. 107, 112.

CONCLUSION

The decision of the lower court is correct and does not present a conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1944.